HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

SERGE ANIKIN APPELLANT

AND

ALFONSO SIERRA & ANOR RESPONDENTS

Anikin v Sierra
[2004] HCA 64
9 December 2004
S631/2003

ORDER

1. *Appeal allowed with costs.*
2. *Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales made on 7 February 2003 and, in their place, order that the appeal to that Court be dismissed with costs.*

On appeal from the Supreme Court of New South Wales

Representation:

B M Toomey QC with I S McLachlan for the appellant (instructed by Warren & Warren)

K P Rewell SC with A R Beardow for the respondents (instructed by Keddies Litigation Lawyers)

CATCHWORDS

Anikin v Sierra

Negligence – Duty of care – Motor vehicle accident – Pedestrian struck by motor omnibus – No eyewitnesses – Pedestrian visible to driver of motor omnibus well before collision – No other vehicles on road impeding driver's capacity to avoid impact – Driver's failure to brake or swerve to avoid pedestrian – Whether open to primary judge to find driver negligent upon the evidence.

Negligence – Contributory negligence – Pedestrian walking on road at night in dark clothing – No footpath visible to pedestrian – Driver's superior capacity to control outcome – Whether pedestrian contributorily negligent – Apportionment of liability.

Appeal – Appellate review of fact-finding at trial before judge alone – Reversal by appellate court of findings of fact at trial – Limitations on appellate review of findings at trial.

Judiciary Act 1903 (Cth), s 37.
Supreme Court Act 1970 (NSW), s 75A.

1 GLEESON CJ, GUMMOW, KIRBY AND HAYNE JJ. This is an appeal from the Court of Appeal of the Supreme Court of New South Wales[1]. That Court was divided on the issues in the appeal. Its orders followed the conclusions of the majority (Beazley JA with whom Heydon JA agreed). The dissenting judge (Santow JA) favoured dismissing the appeal on the issue of negligence, although he would have substantially increased the provision for contributory negligence[2].

2 In this Court, the party successful at trial sought restoration of the judgment in his favour on the ground that the majority of the Court of Appeal had erred in disturbing that judgment. The parties disputed the issue of contributory negligence. In our view, the appeal succeeds. The analysis of the dissenting judge on the issue of negligence is to be preferred. The judgment at trial, including on the issue of contributory negligence, should be restored.

The uncontested facts

3 Mr Serge Anikin, the appellant, is a young man who was seriously injured on 29 March 1997 on the Epping Road near Epping, a suburb of Sydney. His injuries were the result of being struck by a motor omnibus whilst he was a pedestrian. The bus was owned and operated by the State Transit Authority of New South Wales, the second respondent. At the relevant time, it was driven by Mr Alfonso Sierra, the first respondent ("the bus driver").

4 Most of the background facts relevant to the happening of the accident, and many of the inferences to be drawn from those facts, are uncontested. The appellant was walking on the outside lane of the road when the respondents' bus hit him. The bus struck him head-on on the front corner of its left-hand side, catapulting him back against the doorwell on the side of the bus where blood stains were found[3]. From there the appellant was thrown against a nearby rockface sustaining such serious injuries to his left shoulder and arm that he later required amputation of the arm. The appellant was unconscious for nine days following the impact[4]. He had no recollection of the events immediately

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1 *Sierra v Anikin* [2003] NSWCA 11.

2 *Sierra* [2003] NSWCA 11 at [106]-[108].

3 *Anikin v Sierra* unreported, District Court of New South Wales, 22 March 2002 per Sidis DCJ ("Reasons of the primary judge") at [5.3].

4 *Sierra* [2003] NSWCA 11 at [19], [29].

preceding it[5], and thus could give no evidence to elucidate how the accident had occurred.

5 The appellant sued the respondents for negligence. His action was heard in the District Court of New South Wales by Sidis DCJ, sitting without a jury. The quantification of damages was agreed between the parties at $1 million. Sidis DCJ entered judgment for the appellant. However, she reduced that judgment by 25 per cent for contributory negligence by the appellant, producing an adjusted judgment in the sum of $750,000. It was this judgment that was set aside by the Court of Appeal.

6 At trial, it was common ground that there were no eye witnesses to the way in which the accident had occurred, except the appellant, who could remember nothing, and the bus driver. In material respects, however, the bus driver's evidence was revealed at the trial to be inconsistent and unreliable. The primary judge regarded the inconsistencies as significant. To the extent that there was a difference between the evidence of the bus driver and that of a witness proceeding as a passenger in a vehicle travelling on the other side of the road towards the bus (Mr Fatches), the primary judge preferred the evidence of that witness[6].

7 It was common ground that, on the day of the accident, the appellant, with friends who included his then girlfriend, attended a rock concert held on the grounds of Macquarie University[7]. The appellant drove his friends to that place in his vehicle. However, he was unfamiliar with that area of Sydney and had to be directed to the University[8]. He parked his car in the University grounds; attended the concert; and drank a cup or two of beer with his friends. There was no suggestion in the trial that the appellant was affected by alcohol or other drugs[9].

8 Some time prior to 8.00 pm, the appellant quarrelled with his girlfriend. He left the concert; and moved the position of his car in the University grounds,

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5 *Sierra* [2003] NSWCA 11 at [4], [19].

6 Reasons of the primary judge at [7.3].

7 *Sierra* [2003] NSWCA 11 at [26].

8 *Sierra* [2003] NSWCA 11 at [27].

9 *Sierra* [2003] NSWCA 11 at [4], [18].

locking it after doing so. The friends subsequently looked for him but, on not finding him or his car, left the University by taxi for Epping Railway Station. At 8.00 pm the appellant telephoned his father stating that he was lost. The father instructed the appellant to return to the University offices to wait there until he could arrive[10]. When the father arrived at about 8.30 pm he could not find the appellant. The appellant had set out on foot along Epping Road. Why the appellant had not driven his car to a point of familiarity or waited for his father is unexplained.

9 The appellant proceeded on foot along the northern side of Epping Road, which is a major arterial road serving that part of suburban Sydney[11]. He was proceeding in a westerly direction in the direction of the Epping Railway Station[12]. There was evidence from a witness at the accident scene suggesting that the appellant was wearing a dark coloured shirt and light coloured trousers. However, it was common ground in the briefs to the experts later retained for the litigation that the clothing was dark in colour, save for a one-inch white stripe on the appellant's shoes which were tied with white shoelaces. There were no bus stops in the vicinity of the accident scene. Although there were street lights on each side of Epping Road, near the point of impact, neither was functioning on the evening of the accident[13]. It was a clear night[14]. There was no rain[15]. It was a Saturday evening towards the end of the period of daylight saving. At 9.00 pm, the approximate time of the accident, it was dark. However, the police witness who was quickly on the scene resisted the suggestion that it was "very dark indeed". When the police officer first drove through the area it was "twilight to dark". He was there for four to five hours. Neither in driving there nor when on the spot did he "observe any strong deficiencies in lighting"[16].

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10 *Sierra* [2003] NSWCA 11 at [35].

11 *Sierra* [2003] NSWCA 11 at [39].

12 *Sierra* [2003] NSWCA 11 at [38].

13 *Sierra* [2003] NSWCA 11 at [18], [41].

14 *Sierra* [2003] NSWCA 11 at [18].

15 *Sierra* [2003] NSWCA 11 at [43].

16 *Sierra* [2003] NSWCA 11 at [42], reproducing the evidence of Acting Sergeant Guff.

10 The bus driver had completed a shift of about nine hours. He was driving the bus with no passengers on board, and with the internal lights off, in the direction of the depot. He was travelling at between 70 and 80 kilometres per hour[17]. The speed limit on this portion of the Epping Road was 80 kilometres per hour. Immediately before the impact, the bus was proceeding down a seven degree gradient and it may have picked up a little speed. The appellant was proceeding on foot in a direction facing oncoming traffic, such as the bus. It was agreed that the bus would have been visible to a pedestrian such as the appellant over about 108 metres[18]. The bus had its front lights illuminated on low beam. Such lights threw a range of illumination downwards and to the left of the bus[19]. That is, the lights of the bus were cast in the direction of the road ahead and towards the edge of the road to the left of the bus driver. The maximum range of illumination of such lights, according to an expert witness called for the respondents (Mr Joy), was approximately 50 to 60 metres. However, what the actual illumination of people and objects would be depended on the range of colours they presented and any contrast with the background that was also illuminated[20].

11 Just prior to the place of impact between the bus and the appellant, the footpath which ran along the side of Epping Road ran out. Steps led upwards over an interval of rockface. Inferentially, the rock had been carved out when Epping Road was built or widened. There was no sign indicating continuing pedestrian access by way of the steps and by resumption of a safe footpath[21]. On the opposite side of the road there was bushland and no footpath. In front of the appellant on the northern side of the road lay the rockface and a narrow shoulder of between one and two metres wide, without a footpath. Given the circumstances of darkness, and the absence of a sign, the respondents did not suggest that it was unreasonable for the appellant to press on beside the rockface, without ascending the steps.

12 The conditions on the verge of the road near the rockface were also largely undisputed. They are illustrated in photographs that were taken

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17 *Sierra* [2003] NSWCA 11 at [3], [6].

18 *Sierra* [2003] NSWCA 11 at [21].

19 *Sierra* [2003] NSWCA 11 at [51].

20 *Sierra* [2003] NSWCA 11 at [53].

21 *Sierra* [2003] NSWCA 11 at [39].

immediately after the accident and received into evidence. These show a quantity of rubbish, involving plastic bags, newspapers and other debris scattered over the shoulder near the rockface together with a section of broken asphalt. A "fogline" marked the northern extremity of the lane in which the bus was proceeding on the side of the road on which the appellant was walking. It was an unbroken white line designated to illuminate the extreme edge of the trafficable surface of the road.

13 It was at this place in the road, adjoining the rockface, that the impact between the front left side of the bus and the appellant occurred. Before the primary judge, the appellant argued successfully that the circumstances demonstrated negligence in the sense of lack of due care and attention on the part of the bus driver in causing the impact, in failing to keep a proper lookout, in failing to sound the bus horn and in failing to stop the bus or to cause it to deviate slightly so as to avoid the impact.

The contested facts

14 *The appellant's alleged gestures*: At this point in the narrative it is necessary to mention certain conflicts and uncertainties in the evidence that it fell to the primary judge, in the first instance, to resolve.

15 The first conflict concerned the bus driver's allegation that the impact had occurred because, suddenly and without warning, the appellant had jumped, in effect, in front of the bus, apparently seeking to flag it down.

16 It must be accepted that there were some elements in the evidence that might have combined to persuade the trial judge that something like this had happened. Clearly, the appellant was unfamiliar with the district. He had told his father earlier that he was lost. There was also more than a suggestion in the evidence that he was upset because of the argument with his girlfriend. Leaving his car at the University and setting out on foot was unexplained.

17 However, the primary judge, for reasons that she gave, rejected the bus driver's version of events in this regard. She did so, in part, by a comparison of that version with other statements that the bus driver had made; in part, by reference to the injuries suffered by the appellant and the damage to the bus and other objective indications; and, in part, by reference to the evidence of Mr Fatches, whom she accepted.

18 As to the other statements, a police officer who arrived at the scene immediately following the accident found the bus driver "shocked and upset"[22]. The bus driver told the police officer that "[the appellant] just stumbled out, I tried to swerve"[23], or words to that effect. In fairness to the bus driver, the primary judge noted that another witness, Mr Marco Denev, a motorist who had stopped after the accident, was told by the bus driver that "there was a gentleman who flagged me down but was proceeding to get on the bus, and that is when I hit him"[24].

19 The primary judge quoted the evidence of the bus driver to the effect that the appellant was "approximately two metres from the kerb, so it was very near not exactly in the middle but very close" [to the centre of the bus's lane][25]. He was described as "jumping with both hands up, there is nothing I could have avoided him" [sic][26]. However, as the primary judge was to point out in her reasons, this description of the position of the appellant in relation to the bus was inconsistent with the objective evidence of minor damage only to the near-side edge of the bus. It was also inconsistent with the nature of the injuries received by the appellant[27].

20 Against the suggestion that the purported position of the appellant, effectively in the centre of the lane in which the bus was travelling, could be reconciled with the injuries suffered by the appellant on the footing that the bus had indeed swerved to avoid hitting the appellant, the primary judge relied on the evidence of Mr Fatches. He had watched the bus travel east along Epping Road, proceeding towards the vehicle in which he was travelling. He said that there were no vehicles ahead of, beside or behind the bus. He gave evidence that the bus did not swerve and that it travelled at a steady speed within its lane[28]. He observed the bus from a distance of approximately 20 to 30 metres. Although he

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22 Reasons of the primary judge at [5.3].

23 Reasons of the primary judge at [5.3].

24 Reasons of the primary judge at [4.10].

25 Reasons of the primary judge at [3.3].

26 Reasons of the primary judge at [3.3].

27 Reasons of the primary judge at [7.2].

28 Reasons of the primary judge at [7.3].

did not see the impact of the bus with the appellant, he saw a spray of glass come from around the back and under the back of the bus. After the bus passed, he saw a person lying in the gutter[29].

21 Apart from the conventional advantages that her Honour enjoyed in observing both the bus driver and Mr Fatches give evidence in the trial[30], there were also objective facts, notably the site and extent of damage to the bus, injuries to the appellant and scuff marks on the road "left by the band of white around the shoes the [appellant] was wearing at the time of the accident"[31] all of which the primary judge called in aid in reaching her conclusion. It was a conclusion unamenable to appellate correction[32].

22 *The bus driver's length of vision*: The bus driver's case was essentially that the appellant had suddenly and unexpectedly moved, effectively into the centre of the lane in which the bus was travelling. That lane was shown by the evidence to be about 3.2 metres wide[33]. On this basis, the bus driver asserted that he had only 10 metres within which to stop or avoid the appellant[34]. Later, when reminded of two similar but not identical statements that he had made to police, fixing the distance at 15 metres ahead of him, the bus driver adjusted his oral evidence to agree in cross-examination with the distance of 15 metres[35]. Significantly, in one of the police statements the driver had said that the pedestrian "was walking about two metres from the kerb in lane 1."[36] Obviously, if the appellant had suddenly moved into the centre of the roadway of lane 1, there would be no negligence on the part of the bus driver for failing to avoid collision with the appellant.

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29 Reasons of the primary judge at [4.1]-[4.3].

30 *Jones v Hyde* (1989) 63 ALJR 349; 85 ALR 23; *Abalos v Australian Postal Commission* (1990) 171 CLR 167; *Devries v Australian National Railways Commission* (1993) 177 CLR 472.

31 *Sierra* [2003] NSWCA 11 at [54].

32 *Fox v Percy* (2003) 214 CLR 118.

33 *Sierra* [2003] NSWCA 11 at [80].

34 *Sierra* [2003] NSWCA 11 at [57].

35 *Sierra* [2003] NSWCA 11 at [57], [58].

36 *Sierra* [2003] NSWCA 11 at [60].

23 Once again, the primary judge rejected these assertions. Again, her decision in this respect relied in part upon her assessment of the credibility of the bus driver. That fact would likewise make it immune from appellate correction. However, the rejection of the bus driver's evidence was confirmed by evidence to which the primary judge pointed. This included the lack of any evidence of braking marks on the road surface; the site of the relevant damage and injuries previously described; and the virtually uncontested evidence of expert witnesses called by both sides concerning the projection of illumination from the bus lights on low beam. It was common ground that this afforded illumination of 50 to 60 metres of the road ahead with a bias to the left side that would pick up "visual cues" appearing on the left.

24 The white stripe on the appellant's shoes constituted such "visual cues" for a professional bus driver paying due attention. The primary judge, unsurprisingly, thought it unlikely that the appellant would have deliberately moved directly in front of a large bus travelling at 70 to 80 kilometres per hour which he had well in his vision. Whilst accepting that it was "unlikely" from the bus driver's point of view that a pedestrian would have been walking on that part of Epping Road at 9.00 pm on a Saturday evening[37], the primary judge was equally unwilling to conclude that the appellant "would have leaned forward or walked into the path of a large bus"[38].

25 The objective facts, together with the natural concern of the bus driver with the possibility of a police prosecution (with the relevance of any such action for his employment) were further factors that led the primary judge to reject the bus driver's evidence to the effect that the appellant had only entered the carriageway 10 or 15 metres ahead of the bus. If it were true that the bus driver only saw the appellant 10 or 15 metres before impact, the inference drawn by the primary judge was that this was because the bus driver had failed to keep the proper lookout that would have taken full advantage of the illumination cast over 50 to 60 metres by the bus's headlights and caused him to notice the appellant.

26 *The course of careful action*: The primary judge then had to consider whether evasive action on the part of the bus driver would have avoided the accident, having regard to the point of impact. Because there was no brake mark visible on the road, and having rejected the evidence of the bus driver which

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37 Reasons of the primary judge at [7.1].

38 Reasons of the primary judge at [7.5].

placed the appellant towards the centre of his lane, the primary judge had to resolve the point of impact by reference to other evidence. In this regard, her Honour accepted the evidence concerning the damage to the bus and the injuries to the appellant.

27 She also accepted the evidence of Mr Fatches relating to the spray of glass that he described and the positions where blood was noted and photographed after the appellant came to rest. Relying on these indications and the "scuff marks" previously described, the primary judge found the point of impact to be at least 0.7 metres south of the fog line[39], that is, just inside the trafficable surface of the lane in which the bus was proceeding. On this basis, the primary judge concluded that "a minor deviation in the path of travel of the bus driven by the [bus driver] would have avoided the impact with the [appellant]."[40] Obviously, this conclusion built on her Honour's rejection of the evidence of the bus driver that his capacity to deviate to the right was limited by surrounding traffic, an assertion rejected on the basis of Mr Fatches' evidence.

28 Different minds might respond in different ways to the evidence given at the trial. Much time was consumed there by the evidence of experts. Sometimes such evidence may be helpful in describing technical developments of motor vehicle design (such as the evolution and capacity of modern motor vehicle headlamps) or in applying to uncontested facts commonly accepted tables governing the distance travelled by motor vehicles at different speeds and stopping time allowing for differing driver reaction times. Not all judges are mechanically minded or interested. Expert evidence, grounded in the proved testimony, can therefore occasionally be useful. But in the end, such evidence has weight only in respect of matters within the relevant field of expertise and is only as helpful as the evidence and assumptions on which it is based. Such evidence may not usurp the ultimate decisions which remain for the trial judge. In the present case, the expert reports had (and were treated as having) relatively little significance. In the end, the evaluation of the case depended substantially on the acceptance or rejection of the evidence of the bus driver and Mr Fatches and the application to the facts, as then found, of largely undisputed evidence concerning the illumination in front of the bus and the likelihood that it would have revealed the presence of the appellant in time to permit the avoidance of impact[41].

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39 Reasons of the primary judge at [7.2].

40 Reasons of the primary judge at [7.2].

41 Reasons of the primary judge at [7.1]-[7.4].

The decision of the Court of Appeal

29 *The majority reasons*: The Court of Appeal reversed the judgment entered by the primary judge. The reasons for the majority in that Court were given by Beazley JA. Her Honour acknowledged the limitations imposed on appellate review by the primary judge's rejection of the bus driver's evidence to the effect that there were vehicles beside and behind him that made it dangerous for the bus to swerve to the right to avoid collision with the appellant[42]. This notwithstanding, Beazley JA upheld the submission that there was no evidence to support the finding of negligence.

30 The first step towards this conclusion was a statement that there was "nothing in [the primary judge's] reasons to suggest that the [bus driver] should have seen the [appellant] when he was on the side of the road."[43]

31 Secondly, Beazley JA proceeded to apply to the facts the uncontested tables concerning distance covered at given speeds with adjustment for the differing reaction times of different motorists. This analysis lay at the heart of the reasons that found favour in the Court of Appeal. They were again pressed on this Court. Beazley JA said[44]:

> "If the [bus driver] was travelling at 70 kilometres per hour and based upon a reaction time of 1 second (given that the [bus driver] was a professional driver) he would have travelled 19 metres before 'reacting' to the presence of someone or something on the roadway. It would have taken him another 22 metres to bring his vehicle to a complete stop – a total of 41 metres. At 80 kilometres per hour, the relevant distances are 22 metres 'reaction distance' and 30 metres 'stopping distance' – a total of 52 metres.
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> Had the [appellant] stepped onto the roadway at a time when the bus was 40 metres away, then the [bus driver] would not have seen him, reacted and been able to take action to avoid the accident in sufficient time

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42 *Sierra* [2003] NSWCA 11 at [8].

43 *Sierra* [2003] NSWCA 11 at [10].

44 *Sierra* [2003] NSWCA 11 at [10]-[11].

> to avoid the accident, even if he was only travelling at 70 kilometres per hour. The difference between impact and no impact would have only been about 1 metre, but there would have been an impact which the [bus driver] could not have avoided. … If the speed was closer to 80 kilometres per hour, the [bus driver] would not have been able to stop his bus until approximately 10 metres after the point of impact. Had the [appellant] stepped onto the roadway when the bus was 30 or 35 metres away his position would have been correspondingly more perilous."

32 Because Beazley JA considered that it was equally uncertain as to when the appellant had stepped onto the road surface, the possibilities favouring, or not favouring, his claim were equally valid. Thus the claim was bound to fail[45].

33 *The dissenting reasons*: In his dissenting reasons, Santow JA responded to this analysis by repeating and elaborating the manner in which the primary judge had come to her conclusions. However, his Honour also tackled the basis on which the majority of the Court of Appeal had concluded that the primary judge had erred.

34 First, Santow JA pointed out that it had not been in dispute at the trial that the bus headlights would have illuminated the left-hand shoulder of the road sufficiently to throw some light on a pedestrian proceeding there for 50 metres as found by the trial judge. As Santow JA pointed out, the respondents' own expert, Mr Joy, had concluded his evidence, as described by the primary judge, thus[46]:

> "[T]he [bus driver] had understated the distance from which he saw the [appellant] and proposed that, in order to carry out the actions of braking, swerving and straightening the bus, he probably initially perceived the risk of collision with the [appellant] from 34.5 to 43.5 metres."

35 The reference to "50 metres" was clearly a reference to the evidence given at trial concerning the illumination cast by the front headlights of the bus over 50 to 60 metres. The fact that that illumination was cast with a bias to the left-hand side of the road is highly relevant to the likelihood that it would have picked up "visual cues" in the footwear of the appellant walking in a direction facing the bus.

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45 *Sierra* [2003] NSWCA 11 at [12], applying *Luxton v Vines* (1952) 85 CLR 352.

46 *Sierra* [2003] NSWCA 11 at [88].

36 Secondly, and more importantly, Santow JA pointed out that the majority reasoning proceeded on the basis that braking was the only relevant evasive action that the bus driver could have taken[47]. Self-evidently, from the conclusions of the primary judge, this was not (as Santow JA demonstrated) the way the primary judge had reasoned.

Conclusions on negligence

37 It is necessary to accept the large functions belonging to an appellate court, such as the Court of Appeal, in reviewing findings of fact of a judge sitting without a jury[48]. Those functions, which derive from the provisions of the legislation governing the Court of Appeal in such proceedings[49], require that Court to conduct its own independent review of the facts, giving effect to its own conclusions about them. It must do this save to the extent, if any, that the primary judge enjoys advantages that cannot be fully recaptured by the appellate court. In these last respects, the appellate court should defer to the findings of the primary judge except for the very limited circumstances where it is authorised to substitute its own, differing conclusions[50].

38 No occasion arises in this appeal to repeat the principles governing the appellate revision of fact-finding at trials conducted by judges sitting alone. The principles, with particular reference to s 75A of the *Supreme Court Act* 1970 (NSW), were stated by Gleeson CJ, Gummow and Kirby JJ in a passage in *Fox v Percy*[51] recently adopted by Callinan and Heydon JJ in *Pledge v Roads and Traffic Authority*[52]. In the exercise of its own appellate jurisdiction, this Court is

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47 *Sierra* [2003] NSWCA 11 at [94].

48 *State Rail Authority of NSW v Earthline Constructions Pty Ltd (In Liq)* (1999) 73 ALJR 306 at 320-321 [58]-[64], 330-332 [89]-[93], 340 [146]; 160 ALR 588 at 605-607, 619-622, 632-633.

49 *Supreme Court Act* 1970 (NSW), s 75A.

50 *Fox* (2003) 214 CLR 118.

51 (2003) 214 CLR 118 at 125-128 [21]-[25], [27].

52 (2004) 78 ALJR 572 at 581-582 [43]; 205 ALR 56 at 67-69. See also *Shorey v PT Ltd* (2003) 77 ALJR 1104; 197 ALR 410; *Joslyn v Berryman* (2003) 214 CLR 552; *Whisprun Pty Ltd v Dixon* (2003) 77 ALJR 1598; 200 ALR 447; *Hoyts Pty Ltd v Burns* (2003) 77 ALJR 1934; 201 ALR 470.

not concerned, as such, to review the facts for yet a further time. It will not do so unless error is shown on the part of the intermediate court in the manner in which it has discharged its own functions[53]. But if such error is shown, this Court is authorised, and may be required, to correct the error.

39 With respect to the majority in the Court of Appeal, we have concluded that their Honours erred in disturbing the primary judge's conclusion on the issue of negligence. Santow JA was correct in his analysis in the closing part of his reasons and, specifically, in his riposte to the reasons of the majority.

40 The starting point for the Court of Appeal's analysis was the conclusion of the primary judge concerning the credibility of the evidence of the bus driver. Had the primary judge accepted the bus driver's evidence, concerning the position that the appellant took up towards the middle of the lane in which the bus was travelling, and the suggestion that he assumed that position only 10 or 15 metres in front of the bus in order to flag it down, the conclusion of the Court of Appeal that there was no evidence of negligence would have been irresistible. However, once the primary judge rejected that evidence, the foundation for an opinion that there was "no evidence" of negligence on the part of the bus driver was undermined. It then became necessary for the primary judge to draw inferences, as she sought to do, concerning where the appellant was when he was struck, how long before impact he had been on the road surface, what he was doing and how far he would have been visible to the bus driver, exercising reasonable care and keeping a proper lookout in driving the bus.

41 The conclusions of the primary judge, having reached her view about the evidence of the bus driver, were anchored in the testimony of Mr Fatches, which she accepted. According to that evidence, the bus had no relevant vehicles in front, beside or behind it. The bus simply continued steadily in its own lane. It did not deviate to the right, as it might have done safely on these premises. The position of the appellant, walking to the side of the road, was explained adequately by the apparent absence of a footpath there and reasonable conduct on his part of avoiding a ditch, broken asphalt and refuse in that section of the road shoulder near the rockface that the appellant had reached on foot. To traverse that section, whilst avoiding these obstacles, the appellant entered upon the road surface. However, he did so only to a small degree, estimated by the primary judge at 0.7 metres. Whilst retrospect suggests that he might have waited or kept more closely to the shoulder and the rockface ignoring the obstacles (and whilst later knowledge suggests that he could have climbed the steps to take him to a

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53 *Liftronic Pty Ltd v Unver* (2001) 75 ALJR 867 at 879 [65]; 179 ALR 321 at 336.

continuation of the footpath), the course that he adopted put him potentially within the illumination of the bus headlights with their bias to the left-hand side and projection over about 50 metres.

42 Far from the objective evidence giving any basis for the Court of Appeal to set aside the findings of the primary judge concerning the evidence of the bus driver, that evidence (as Santow JA points out) supported the conclusion so reached. The fact that there were no skid or brake marks and that the bus did not reach a stop after the point of impact for some 110 metres suggests that the bus driver did not see the appellant at all, save possibly at the very last moment. This, in turn, supports the primary judge's conclusion that there was a lack of due attention on the part of the bus driver.

43 However, the most decisive criticism in the reasons of Santow JA relates to the reasoning of the majority in the Court of Appeal that there was insufficient time for the bus driver to bring the bus to a stop before impact with the appellant. Even if that were so (depending on the combination of factors such as the speed of the bus, the bus driver's reaction time, the precise movements of the appellant and the moment of reasonable perception in the available illumination) this does not answer the essential way in which the primary judge reasoned to her conclusion of negligence.

44 The route that the primary judge took was founded in the acceptance of the testimony of Mr Fatches, which was a course certainly open to the primary judge. Moreover, that evidence was reinforced to some extent by objective facts. The bus did not swerve or brake. It did not sound its horn. Yet, according to Mr Fatches, there was no impediment to its moving to the right. Having regard to the damage to the bus and the injuries to the appellant's left upper extremities, the degree of movement required was but slight. The bus driver's capacity to move safely was established in a manner invulnerable to appellate disturbance.

45 The only excuse that would save the bus driver from a finding of negligence in these circumstances was his suggestion that the appellant moved suddenly out into the centre of the road waving his arms or stumbling into the path of the bus. As that version of events was rejected in terms that were not ultimately challenged in this Court, the finding of "no negligence" cannot stand. The majority of the Court of Appeal erred in reaching, and giving effect to, that conclusion.

46 This was not, therefore, a case like *Luxton v Vines*[54] where the possibilities were equally open and neither could be said to be more likely. Nor was it a case like *Derrick v Cheung*[55] where the defendant came upon the infant victim, emerging from two parked vehicles onto the road in the path of the defendant's vehicle driving within the prescribed speed limit. Here, there was a range of visibility available to the bus driver, a professional motorist, if he were keeping a proper lookout. Most importantly, there was an unimpeded capacity to move the vehicle to the right. Had that been done even at a late stage the serious injury to the appellant would have been avoided. True, the appellant was obliged to keep a proper lookout for his own safety. However, the bus driver, who was in charge of a powerful vehicle had obligations to exercise care for pedestrians in the position of the appellant[56].

47 Having regard to findings made by the primary judge which are impregnable against appellate correction, it was incorrect of the Court of Appeal to conclude that there was "no evidence" of negligence. It was equally incorrect to treat the case as one where the only precaution that might have been taken by the bus driver was that of stopping the bus. This was neither what the appellant asserted nor what the primary judge found. The judgment at trial in favour of the appellant should not have been disturbed.

Conclusions on contributory negligence

48 One of the grounds of appeal urged upon the Court of Appeal by the present respondents was that the primary judge had erred in assessing the contributory negligence of the appellant at 25 per cent. Santow JA agreed and would have increased the proportionate liability of the appellant to 60 per cent. It was unnecessary for the majority to deal with the question, but their Honours indicated that they would have been in favour of an increase to 60 per cent if not more.

49 In this Court, there was no cross-appeal by the respondents, who had achieved complete success in the Court of Appeal. The circumstances may not

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54 (1952) 85 CLR 352. See also *Nominal Defendant v Owens* (1978) 22 ALR 128 at 132; *Transport Industries Insurance Co Ltd v Longmuir* [1997] 1 VR 125 at 141, cited in *Sierra* [2003] NSWCA 11 at [12].

55 (2001) 181 ALR 301.

56 *Pennington v Norris* (1956) 96 CLR 10 at 16-17.

have supported a notice of contention under O 70 r 6(5) of the High Court Rules because the respondents do not contend that any matter of fact or law had been erroneously *decided* against them. Section 37 of the *Judiciary Act* 1903 (Cth) empowers this Court to give such judgment as the Court of Appeal ought to have given. Rather than remit any issues which remain outstanding in the respondents' appeal to the Court of Appeal, the parties urged this Court to deal with the matter so as finally to dispose of the litigation. Counsel presented submissions supporting respectively the stances taken by the trial judge and Santow JA.

50 It is accepted that the decision of the trial judge is "not lightly reviewed".[57] Santow JA referred to the authorities for that proposition but did intervene with the result indicated above.

51 However, his Honour did not refer to the decision of this Court in *Pennington v Norris*[58] where it was stressed that what was to be considered was the respective degrees of departure from the standard of care of the reasonable person. On the facts of *Pennington* it was said that to drive a car at high speed involved negligence of a far greater culpability than the failure of the plaintiff to keep a proper lookout when crossing the road. This Court in *Pennington* fixed the proportions at 20:80, rather than the 50:50 which had been fixed by the trial judge.

52 Consistently with that reasoning, Sidis DCJ emphasised that the first respondent had, as the bus driver, far greater capacity to cause damage, and was the major cause of the accident. Her Honour distinguished the instant case from accidents on crowded city streets where plaintiffs had stepped onto roads without looking and defendants had had minimal opportunity to avoid impact. There was evidence that in daylight hours pedestrians including school children, walked on that part of Epping Road where the accident happened. Her Honour rejected the submission that in darkness and without signage it would have been more reasonable for the appellant to have taken the footpath traversing the top of the rock wall.

53 The primary judge accepted that the appellant had the capacity to see the approaching bus. To that, it may be added that this capacity may have been

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57 *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALJR 492 at 494; 59 ALR 529 at 532-533; *Liftronic* (2001) 75 ALJR 867 at 868 [2]; 179 ALR 321 at 322; *Berryman* (2003) 214 CLR 552 at 578-579 [84], 601-602 [157].

58 (1956) 96 CLR 10 at 16-17.

greater than that of the bus driver who was approaching, at greater speed, an object which was both unexpected and less readily visible.

54 Her Honour went on to accept that the appellant "should have stepped away from the trafficable portion of lane 1," and that had he done so "the accident would have been avoided." In the latter respect, she may have overstated the matter. It is by no means clear that if the appellant had walked on the fog line and not strayed from it the accident would not have happened. Lane 1 was 3.2 metres wide and the bus was 2.5 metres wide and it was found that the bus was wholly within lane 1 and had not deviated. If the bus were in the middle of the lane when it struck the appellant, it would have been 0.35 metres from the fog line; if the feet of the appellant were astride the fog line, his upper body would have overhung that 0.35 metres. The appellant is able to point to these matters to support the conclusion that Sidis DCJ did not err in the outcome she reached on apportionment. Any misapprehension of fact could only further support the appellant on that issue.

55 The interference which Santow JA would have made in the apportionment was based upon a view of the comparative seriousness of the failure of the appellant to "remove himself from the road" once the bus had become visible[59]. That, however, would not open the door to appellate review on the ground of the manifest error spoken of in the authorities[60]. The view of Beazley JA on the matter must be understood in light of what has been shown to be an incomplete appreciation of the evidence and what followed from it.

56 We would not disturb the apportionment for contributory negligence made by the primary judge because the gateway to appellate intervention should not be opened.

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59 *Sierra* [2003] NSWCA 11 at [104].

60 *Phillis v Daly* (1988) 15 NSWLR 65 at 78 per McHugh JA.

Orders

57 The appeal should be allowed with costs. The orders of the Court of Appeal of the Supreme Court of New South Wales should be set aside. In place thereof, the appeal to that Court should be dismissed with costs.

58 CALLINAN J. The question in this case is whether an intermediate court of appeal was right to regard the decision of the trial judge as being based upon conjecture and speculation, rather than inferences legitimately drawn from established facts.

The facts

59 In March 1997, in an area not frequented by pedestrians, and in which the closest street lights were not functioning, at about 9:00 pm, in darkness, and dressed in dark clothing the appellant was walking beside the carriageway of Epping Road in Sydney. That road is a major arterial of four lanes. A white fog line was painted on the carriageway towards the left extremity of it. A broken yellow line was also painted on its edge to designate the shoulder there as a "No Stopping" zone. The appellant was heading in a westerly direction and was on the northern side of the roadway. There was a formed footpath near the roadway where the appellant was walking. At this point however it ascended up a cliff face about five metres high. Its presence would not have been readily apparent to a stranger to the area. There were a few houses on one side of the road and dense scrub on the other. The sealed shoulder of the road on the northern side was 1.2 to 2 metres wide.

60 The precise circumstances which led to the appellant's presence on the roadway are not known. He had earlier attended a concert at Macquarie University which he had left prematurely after an argument with his girlfriend, leaving his car behind him. Later, he had telephoned his father to tell him that he was lost. His father told him to go to the University where he would collect him. Why he had chosen to leave his car behind him, and what he had done, and where he had been after he parted from his friends at the University, are all unknown and unexplained.

61 At the same time as the appellant was walking beside the roadway, the first respondent was driving his employer's, the second respondent's, bus in an easterly direction in the left of the two lanes in accordance with his direction of travel, at a speed approaching 80 kilometres per hour and within the speed limit for that section of the road. The bus was empty. Both its headlights and a large sign on the front of it for the display of its destination or a number, were illuminated. A motor car was also travelling towards the appellant in a westerly direction.

62 The first respondent gave this account in evidence of what occurred:

> "Q. When you went into the area to where the accident finally happened, did you see something?
>
> A. Suddenly a man was stopping my bus sir.

Q. What was the first you saw of him?

A. He was jumping to stop my bus sir.

Q. Where was he with regard to the fog line on the left hand side of the roadway when you first saw him?

A. He was approximately two metres from the kerb, so it was very near not exactly in the middle but very close.

Q. In your lane?

A. In my lane.

Q. How far ahead of you was he when you saw him?

A. Approximately 10 metres.

Q. What did you do?

A. I tried to brake, there is nothing in the world I could have [sic] avoided the accident sir, it was there.

...

Q. Was he [the appellant] doing anything?

A. He was jumping with both hands up, there is nothing I could have [sic] avoided him."

He added that on seeing the appellant he had braked, and tried to swerve to his right, but that the bus struck the appellant when he straightened it.

63 The first respondent rejected a suggestion that there were no cars closer than 70 to 80 metres to the bus. He said there were cars in the lane beside the bus. He had wanted to swerve further to his right but had been deterred by the horns sounded by the drivers of those cars. The first respondent said that if he had swerved too far in that direction he would have collided with motor vehicles travelling in the opposite direction. He insisted that there had been sufficient time to brake, swerve and straighten the bus although he had first seen the appellant from a distance of only 10 metres.

64 A police officer who came to the scene of the accident and interviewed the first respondent described him as shocked and upset. After asking about the appellant's condition the first respondent said: "He just stumbled out, I tried to swerve", or words to that effect. He also told the police officer that he had not seen the appellant until he was 15 metres away from him.

65 The appellant suffered injuries in the accident which, among other things, have deprived him of any capacity to recall the accident and the events leading up to it.

66 The appellant sued the respondents in negligence in the District Court of New South Wales. The respondents denied that the first respondent had been negligent and alleged contributory negligence.

The trial in the District Court

67 The case came on for trial before Sidis DCJ. On the issue of liability, in addition to giving evidence themselves, each side relied on a "traffic expert". Other witnesses included occupants of cars travelling on Epping Road at the time of the accident, and investigating police officers. One of the occupants of a car travelling in a westerly direction, Mr Fatches said he saw the bus when it was 20 or 30 metres away. He did not notice any deviation in its line of travel.

68 Both of the experts purported to reconstruct the events leading up to, and the accident itself. No objection was taken to these reconstructions, or to the qualifications of the experts to state the opinions that they did on a variety of matters, including psychological and physiological matters. Absence of objection cannot however correct what is plainly speculative, or informed by no relevant field of expertise, into evidence of probative value. The experts agreed that if the first respondent had been travelling at 70 kilometres per hour and had seen the appellant from a distance of 15 metres (as claimed in his statement to the police officer at the scene), or 10 metres (as stated to the Court), he would not have had time to brake and swerve to avoid the appellant. The respondents' expert purported to conclude that the first respondent had understated the distance from which he saw the appellant, and contended that, in order to have been able to brake, swerve and straighten the bus, he probably initially had perceived the risk of collision from a distance of 34.5 to 43.5 metres. He added that the first respondent could have slowed the bus to a speed of 48 kilometres per hour over a distance of 19.5 metres if he had braked and swerved simultaneously. The appellant's expert purported to know, and stated, that the first respondent had not been paying proper attention, and accordingly did not have the time or opportunity of avoiding the appellant.

69 It is necessary to examine in greater detail what Mr Woodward, the expert for the appellant, stated in his written report which was in evidence, and upon which the trial judge substantially relied for her decision.

70 Section 3 of the report bears the ambitious title "crash aetiology" as a synonym for the cause of the accident. It then records a quantity of unsubstantiated information (not all of which is uncontroversial) of which Mr Woodward could have had no personal knowledge. The next section of the

report, "crash situation" describes apparently fresh scuff marks seen on the roadway, and line marks about 108 metres in length from which Mr Woodward concluded that the bus travelled 122.5 metres after impact.

71 After noting that the first respondent was 60 years old at the date of the collision, he referred to some statistics relating to "perception times" of male drivers, in daylight, aged 25 to 40 years.

72 Mr Woodward then embarked upon an allocation of culpability for the accident. He stated his conclusions as follows:

> "7.01 This report concerns a collision at night between a bus and a pedestrian who was walking towards it. A poorly lit, non standard walkway had been provided and was separated from the vehicle carriageway simply by a painted edgeline and reflective raised pavement markers. The other edge of the walkway consisted of a stone cliff. It is *possible* that the pedestrian, in the darkened conditions, *was compelled* to walk on the vehicle carriageway due to the rubbish, detritus and undergrowth which had accumulated on the walkway …. This means that the *bus driver should have taken extra care whilst travelling along this pedestrian-unfriendly part of Epping Road*. The bus driver stated he was 'very familiar with the road where the collision occurred', and should have been aware of the potential danger.
>
> 7.02 As can be seen in photo 6 in this report, there was a substantial amount of rubbish and weeds growing on the walkway. Whether this had any adverse effect towards the collision is a matter of speculation.
>
> ...
>
> 7.04 The driver stated the pedestrian was 15 metres ahead of him. He said that the pedestrian appeared to be signalling him. Requirements of the Motor Traffic Regulations were that the headlights of the bus should have 'an effective range of 50 metres.'
>
> 7.05 In paragraphs 5 and 6 of the bus driver's statement, summarized in paragraphs 5.03 to 5.05 of this report, the driver has provided an extensive and detailed account of the 'perception-response' phase of this collision. Onto this would have to be added the physical distance required to bring the vehicle to a halt from the stated 70 km/h it was initially travelling. *From the conservative figures I computed in para 6.04 above, it is difficult to reach any conclusion other*

> *than the bus driver was not keeping a proper lookout, otherwise he would have observed the pedestrian sooner, and be able to set his 'perception-response' in train earlier.* The regulations required at least an effective range of the headlights of 50 metres. *Whilst it is impossible to say that he may have avoided the pedestrian, certainly the latter's injuries would have been substantially mitigated.*
>
> ...
>
> 7.07 The point of impact occurred approximately half way between two illuminated mercury-vapour streetlights which were 120 metres apart. There should have been another street light midpoint between the two operating lights, but at the time of the collision, it was not lit. The streetlights were placed on the opposite or southern side of Epping Road. They provided light for guidance of pedestrians on the southern side of the road.
>
> 7.08 There is little doubt the bus was being driven at a speed that was excessive in the circumstances by this driver who was completing his shift." (emphasis added)

73 After the respondents provided their expert's report Mr Woodward made a report in response to it. I need not refer in detail to it except to note that it is argumentative and even more egregious in the conjectural conclusions which its author claims to be able to assert[61]. Not the least of its defects is its criticisms of the respondents' expert for doing what he himself had done, for example, expressed opinions about what a person in the first respondent's position could and would have seen on the night, the use to which photographs were put, estimations of the degree and quality of the available light, and the application of statistics relating to physiological matters, "eye test results". I need only add in relation to the written report that it was not only unedifying and overtly partisan, but also unconvincing for its author to make a charge in it of predesignation against the respondents' expert. A similar examination of the transcript of Mr Woodward's oral evidence at the trial reinforces the impression of partisanism. For example, on a number of occasions when confronted with matters which he had either overlooked or ignored, in one instance the presence of fresh blood on the roadway, he refused to acknowledge that it could have had any relevance to his theory about the point of impact. Some of the same criticisms could no doubt be made of the report and evidence of the respondents'

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61 cf *Clark v Ryan* (1960) 103 CLR 486 at 490-492 per Dixon CJ, a case in which objection had been taken.

expert but as neither the trial judge nor the Court of Appeal relied in any way upon these, reference to them is unnecessary in this Court.

74 The trial judge largely rejected the evidence of the first respondent. She summarized her findings in this way:

> "(1) The [first respondent] had the capacity to see the [appellant] from a distance of at least 50 metres.
>
> (2) The [first respondent] could have stopped the bus which he was driving, sounded the horn on the bus, or taken effective evasive action if he had seen the [appellant] from a distance of 30 metres.
>
> (3) The [first respondent] did not take the appropriate evasive action.
>
> (4) The fact that the [first respondent] did not see the [appellant] at a distance at which he could take effective action leads to the finding that he was not paying adequate attention at the time of the accident.
>
> (5) The point of impact was in the vicinity of point A on the sketch plan, indicating that the [appellant] was positioned somewhere between 1.3 to 0.7 metres south of the fog line. A minor deviation in the path of travel of the bus would have avoided the accident."

75 Her Honour relied, for her conclusions, among other things, upon inferences as to the point of impact and the conduct of the first respondent, which she sought to draw from the minor damage caused to the bus and the nature and extent of the appellant's injuries.

76 The greater capacity of the first respondent as the driver of a heavy vehicle, to inflict injury than the appellant was another of the factors which led her Honour to apportion liability as she did[62].

77 Her Honour apportioned liability against the respondents 75 per cent to 25 per cent. She said that it was inherently improbable that the appellant would have leaned forward, or walked into the path of a large bus travelling at a speed of between 70 to 80 kph. She held the appellant liable in negligence because he could, and should have seen the approaching bus when it was 108 metres away.

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62 *Podrebersek v Australian Iron and Steel Pty Ltd* (1985) 59 ALJR 492; 59 ALR 529.

78 In the result the trial judge gave judgment for the appellant in the sum of $750,000 being three quarters of the damages upon which the parties came to agree was the appropriate measure.

The appeal

79 Both sides appealed to the Court of Appeal of New South Wales (Beazley, Heydon and Santow JJA). Beazley JA (with whom Heydon JA agreed), in upholding the respondents' appeal said this:

> "There was no evidence however as to when the [appellant] first stepped onto the carriageway. He may have done so from the commencement of the unpaved portion of the roadway. He could equally have done so at any point thereafter up until some metres prior to the collision. Nor was there any evidence to indicate when it was more probable that he stepped onto the road. All that is known is that the [appellant] was on the road at some point. The existence of a number of equally available possibilities is not sufficient to found an inference that the [appellant] was on the roadway at a point where the [first respondent] could have seen him, reacted and taken action to avoid the accident ... It follows that there was no evidence to support the basis upon which her Honour found that the [first respondent] was negligent." (footnotes omitted)

80 Santow JA was of a different view. His Honour said this:

> "The Trial Judge sums the position up as she saw it ... '[A]ccording to the [first respondent] the [appellant] was moving towards the bus intent on boarding it. The [appellant] cannot say what he was doing. There is no evidence that he was intoxicated at the time of impact or that he was experiencing any other condition which would cause him to behave carelessly.'
>
> She therefore found it inherently improbable that he would have leant forward or walked into the path of such a large bus travelling as it was at a speed of between 70 to 80 kph. That finding is necessarily an inference, but based on the evidence, including the advantage she had from witnesses particularly the [first responent]. For my part, I would not disturb that finding. I am satisfied that it was properly open to be made, though being an inference it is not immune from appellate intervention."

81 His Honour then effectively adopted one of the conclusions of the expert called by the appellant:

> "The [appellant's] expert, Mr Woodward, makes a telling point when he says:

> 'With the absence of heavy braking marks being detected, assuming the crash investigation unit that attended had the special skills referred to above, I am of the opinion that the driver's attention was focused elsewhere. In his statement to the police
>
> "I saw a man about 15 metres ahead of me"
>
> when read with his references to cars beside and behind him, confirms that he was not keeping a proper look-out ahead of him. If he was travelling properly in lane 1, there is no reason why he should be concerned with traffic elsewhere. (If he had been looking for obstacles ahead he would have seen the [appellant] much earlier.)'"

Santow JA expressed his conclusion in this way:

> "I am therefore satisfied that the findings of the Trial Judge do not disclose appealable error in concluding that the [first respondent], in failing to take such evasive action was liable in negligence. This was not a situation such as that described in *Derrick v Cheung*[63] where the defendant came upon the victim of the accident with insufficient warning to avoid an accident."

Notwithstanding that Santow JA adopted the trial judge's findings and inferences from them, he nonetheless was of the opinion that he should disturb her Honour's apportionment by holding the appellant to be responsible for 60 per cent of his damages and the respondents 40 per cent. The basis for this adjustment was stated in the following passages:

> "But accepting that the [appellant] was walking, not on the adjacent shoulder of the road, but on the laneway itself, with its added danger, is then the [appellant] of greater culpability, or his acts of greater causal potency, in the accident that befell him? While it is true that the [appellant] may have thought that he would be safer, perhaps because more visible or less likely to be crushed against the rock wall, walking on the first lane of the roadway than walking on a rubbish filled shoulder with a dish drain, it was undoubtedly a significant failure on the [appellant's] part to care for his own safety.
>
> Moreover the failure to remove himself from the road once the bus was visible when he still had 108 metres to do so, was a very serious act of carelessness as regards his own safety."

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63 (2001) 181 ALR 301.

The appeal to this Court

82 There are two grounds of appeal to this Court:

1. The majority in the Court of Appeal erred in finding that there was no evidence before the trial judge of negligence by the first respondent.

2. The appeal miscarried by reason of the failure of the majority to review adequately the material before the trial judge upon which she was entitled to make her decision.

83 In this Court the appellant submitted that the trial judge's finding that the first respondent had the capacity to see the appellant from a distance of at least 50 metres, was justified by the evidence of the experts, in particular the appellant's expert Mr Woodward who said:

> "Present-day motor vehicle headlamps are the product of a long, evolutionary process. Low-beam headlamps in particular are asked to provide adequate illumination for safe vehicle operation at all legal speeds, allowing the driver to safely detect objects on the road and detect and read signs that can be placed on either side of the road, as well as overhead. In addition, the system should provide adequate illumination on hills and curves as well as straight flat sections. The system is biased away from approaching traffic, that is, to the left side of the road. In terms of the revealing power of the system, it clearly favours objects to the left. This would favour illumination of the [appellant]."

84 I need not repeat in detail what I said of expert evidence in cases of this kind in *Fox v Percy*[64]. It is sufficient to say that the so-called expert evidence here suffered in a number of respects from the same sorts of defects as there: argumentativeness, conjecture, wide departure from any conceivable area of expertise, partisanism, and a determination to express dogmatic conclusions about fault and liability. Assuming however that the evidence of the experts here with respect to the range of the headlights of the bus was reliable and useful, it could provide no sound basis for a conclusion that the first respondent could, and should have seen the appellant when he was 50 metres away and that he accordingly had sufficient time to take effective evasive action. That conclusion has no, or no sufficient regard to these factors: the need for the first respondent to be attentive to other traffic, including approaching traffic, the absence of pedestrians in the area, the presence of a shoulder of sufficient width to accommodate an unlikely pedestrian, the appellant's dark clothing, and the

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64 (2003) 214 CLR 118 at 166-167 [149].

absence of any evidence at all as to where, in relation to the paved surface, the appellant was walking at any proximate stage as the bus approached. It assumes that because the likely range of the headlights of the bus was 50 metres or so, they would necessarily have illuminated the darkly clad appellant at that point, that the first respondent's attention could and should have immediately focused upon him, and that the first respondent should have anticipated that the appellant would leave the shoulder of the roadway and place himself directly in the path of the bus, which, it is common ground, at all times stayed within its lane on the carriageway. It also involved the implicit acceptance of a perception time relating to the average of persons 25 to 40 years old rather than that of a person of the first respondent's age of 60 years during darkness. The trial judge in this regard appears to have overlooked a rare, but significant concession by Mr Woodward that even had the first respondent immediately seen the appellant and reacted to that sighting the bus would still have travelled more than 80 metres before he could stop it. So too, it was quite unsafe to reconstruct what had happened by reference to the nature of the damage caused to, and the injuries suffered by the bus and the appellant respectively. The former was likely to cause serious injuries to the appellant in any collision in which the bus was travelling, as it was here, at some speed. Nothing of relevance therefore can be deduced from this.

85 The appellant's next submission was to a similar effect, that contrary to the holding of Beazley JA in the Court of Appeal there was material before the trial judge sufficient to found an inference that the appellant was on the roadway at a point where the first respondent could have seen him, reacted in time and taken action sufficient to avoid the accident. The submission is met with the same response as the first. The appellant made an heroic effort, in submissions, to reconstruct a scenario which would locate the appellant on the carriageway itself, rather than on the shoulder of the road when the first respondent saw him, by reference to photographs, and assumptions about how far, and in which direction the appellant would have been catapulted by the impact, the presence of blood on the rock face at a certain point, the position of a light coloured bag on the road, and the presence of some debris in a particular position. Reliance on photographs can and did present its own problems here as appears from the different inferences which the respective experts claimed to be able to draw from them[65]. The further difficulty for the appellant is that he asked the Court to make conjectures about them, as to what happened before the static positions which they showed, and as to the extent to which a viewer's perception of them now coincided with what the parties could, and would have seen before the collision occurred. The invitation to adopt the appellant's scenario was an invitation to speculate, and that, the trial judge did but Courts may not do. The second submission should be rejected.

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65 See *Pledge v Roads and Traffic Authority* (2004) 78 ALJR 572 at 583 [49] per Callinan and Heydon JJ; 205 ALR 56 at 70.

86 The appellant's final submission although made in less specific terms was that had the first respondent been keeping a proper look out, he could and should have avoided the collision. It is right, as the appellant submits, that the trial judge found, and was entitled to find that there was sufficient room on the roadway for the first respondent to swerve to avoid the appellant had he seen him in sufficient time to react to the sighting and assuming that he was bound to anticipate that the appellant would, if he were on the shoulder, move on to the carriageway, or, if on the edge of the carriageway, would stay there. For the reasons that I have already given this submission also cannot be sustained.

87 In my opinion the majority of the Court of Appeal duly performed its statutory appellate duty pursuant s 75(A) of the *Supreme Court Act* 1970 (NSW) ("the Act")[66]. Its entitlement, indeed its obligation, to intervene, was enlarged by the fact that the trial judge's conclusion depended, to put the matter at the best for the appellant, upon inference, although more accurately, upon speculation in part at least.

88 *Nesterczuk v Mortimore*[67] is of some relevance to this case. There the trial judge found himself unable to decide between two conflicting accounts. Here the trial judge rejected most of the first respondent's evidence. Her Honour had however no relevant evidence from the appellant himself. The rejection of the first respondent's evidence could not establish the case sought to be made by the appellant[68]. In *Nesterczuk* Windeyer J made this observation[69]:

> "This case is not one in which nothing is known beyond the fact that the accident happened on a roadway ... The learned trial judge was not persuaded that either account was more probable than the other. I can see no reason why his Honour, feeling unable to choose between them, was bound to conclude that both were false and find the drivers equally to blame on an hypothesis that neither had suggested, namely that both had been driving too close to the centre of the roadway. His Honour was not conducting an inquest to determine the cause of the accident. He was trying a case in which the plaintiff was asserting that the accident was caused by the defendant's negligence ..."

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66 See *Fox v Percy* (2003) 214 CLR 118 at 163-165 [145]-[147].

67 (1965) 115 CLR 140.

68 cf *Hobbs v Tinling (CT) and Co Ltd* [1929] 2 KB 1 at 19 per Scrutton LJ.

69 (1965) 115 CLR 140 at 153.

Some additional remarks of Kitto J are also relevant[70]:

> "The tribunal may of course reason from the material before it, drawing all logical inferences while refraining from speculation. In particular, by comparing that which is proved to have occurred with that which according to general experience is to be expected when a particular condition has been fulfilled, it may conclude that the condition was not fulfilled in the case before it – *res ipsa loquitur*. By this process of reasoning many a case is decided in which the fact sought to be proved is that in a particular situation a person did not conduct himself with reasonable care and skill; but the utility of the process in the present case has been exhausted when the conclusion has been reached that there was a lack of reasonable care on the part of one or other or both of the drivers. Because of the meagreness of the evidence, general experience provides no basis for a belief enabling a choice to be made between the three possibilities by a tribunal acting judicially."

Another quotation, this time from *Luxton v Vines* is equally apposite[71]:

> "It may be possible to say that with proper headlights a motor driver ought prima facie to have been able to see the plaintiff in time to avoid him, in spite of his dark clothes and of the dark wet night. But that supposes that he was standing or walking on the road in the line of light ... It is quite impossible to reconstruct from any materials the manner in which he and the supposed car or vehicle came into contact. It can be done only by conjecture. But a number of conjectures is open, equally plausible."

This is a case in which the real circumstances of the accident are not, and probably will never be known. On any view the appellant's behaviour was unconventional. What is known however would tend to suggest that the appellant was capable, on the evening, of acting erratically. Just as there is no explanation for his presence on the carriageway at the time, there is no explanation why he did not, within the 108 metres available to him to see the bus with its headlights illuminated, take one step further to the side of the roadway. For myself, having regard to this critical factor, and the appellant's unlikely presence at the place and time, in dark clothing, I would have thought a verdict in favour of the respondents inevitable. It is not however necessary to go as far as that to hold that the appeal must be dismissed with costs.

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70 (1965) 115 CLR 140 at 149-150.

71 *Luxton v Vines* (1952) 85 CLR 353 at 359 per Dixon, Fullagar and Kitto JJ.